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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of)

DOCKET FILE COPY ORIGINAL

Martin W. Hoffman, Trustee-in-Bankruptcy)
for Astroline Communications Company)
Limited Partnership)

MM Docket No. 97-128

For Renewal of License)

File No. BRCT-881202KF

and)

Shurberg Broadcasting of Hartford)

File No. BPCT-831202KF

For Construction Permit)

To: The Commission

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SEP 25 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MOTION FOR WAIVER AND APPLICATION FOR REVIEW

Richard P. Ramirez ("Ramirez"), by his attorneys and pursuant to 47 C.F.R. § 1.3, hereby seeks a waiver of 47 C.F.R. § 1.301(b) and review of Judge John M. Frysiak's August 20, 1997 Memorandum Opinion and Order ("MO&O") in the above-referenced proceeding. That MO&O denied Ramirez's Petition for Emergency Relief and Stay of Proceedings ("Emergency Petition"), which (1) requested deletion of the misrepresentation issue designated against Astroline Communications Company Limited Partnership ("ACCLP") based on the fact that the Commission had failed to consider the Connecticut Bankruptcy proceeding^{1/} which favorably

^{1/} Specifically, the Bankruptcy Court found that Ramirez held 21% of ACCLP and had control of the day-to-day operations of the station. This decision was affirmed by the United States District Court, District of Connecticut, and by the United States Court of Appeals for the Second Circuit on April 17, 1997.

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resolved the very same allegations that led to the Hearing Designation Order in this proceeding^{2/} and (2) requested certification of the proceeding to the Commission for its reconsideration of the applicability of the Second Thursday doctrine in light of its failure to consider the Bankruptcy Court litigation. On September 17, 1997, the Presiding Officer denied Ramirez permission to file an appeal of the MO&O.^{3/}

1. Ramirez's request for a waiver of Section 1.301(b) of the Commission's Rules in order to allow consideration of this appeal is well within the Commission's authority. See 47 C.F.R. § 1.3. The Commission will waive its rules if good cause is shown. Id. In cases such as this, the Commission's duty to serve the public interest requires the Commission to give a "hard look" to the specific facts of individual cases. See P & R Temmer v. F.C.C., 743 F.2d 918, 929 (D.C. Cir. 1984). Indeed, the Commission has recently waived Section 1.301(b) in a similar case involving less compelling circumstances. See Mobile Media Corp., FCC 97-197 (released June 6, 1997) ("MobileMedia").

2. The Commission should grant the relief requested because this proceeding involves "basic and far reaching considerations of public policy and vital concerns relating to the public interest" that will cause irreparable harm if not addressed by the Commission at this time. See Communications Satellite Corp., 32 F.C.C. 2d 533, 535 (1971). The Presiding Judge's failure to

^{2/} The hearing was instituted on April 28, 1997 by Commission Hearing Designation Order. In re Applications of Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership For Renewal of License of Station WHCT-TV, Hartford, Connecticut, FCC 97-146 (released April 28, 1997) (the "HDO").

^{3/} Order, FCC 97M-158 (Issued September 17, 1997). For convenience, copies of the Presiding Officer's Orders as well as Ramirez's Emergency Petition, Ramirez's "Consolidated Reply to Comments of Mass Media Bureau and Opposition of Shurberg Broadcasting of Hartford," and "Request for Leave to File Appeal" are attached as Exhibits A-E hereto.

consider the Bankruptcy Court's resolution of the issue of Ramirez's ownership interest in and control of ACCLP completely contravenes the public's interest in the finality of judgments and violates the principle of full faith and credit.^{4/} Forcing parties to relitigate matters that have already been thoroughly adjudicated in civil proceedings operates against the public interest.^{5/}

3. As detailed in the Emergency Petition, the saga of this case began in 1984 - over ten years ago - when ACCLP's application to acquire WHCT-TV, Hartford, Connecticut pursuant to the minority distress sale policy was granted by the Commission. Ramirez, an Hispanic American with substantial broadcast experience, was approved as ACCLP's General Partner. However, the ability of Ramirez and ACCLP to fulfill the goals of the Commission's minority distress sale policy was swiftly hampered by the constant legal attacks of Shurberg. These legal attacks materially contributed to ACCLP's inability to obtain financing needed to continue operating the station. Within four years, creditors of ACCLP filed a petition for involuntary bankruptcy, and Ramirez found himself immersed in a bankruptcy court proceeding.

4. The Commission adopted its minority distress sale policy to enhance minority ownership of broadcast facilities as a remedy to the "acute underrepresentation of minorities among owners of broadcast stations." See Faith Center, Inc., 99 F.C.C. 2d 1164, 1171 (1984). Regrettably, this proceeding illustrates that the Commission has strayed from its commitment to helping minorities such as Ramirez. Without any review of the litigation in the bankruptcy

^{4/} Administrative agencies are prohibited from ignoring federal court judgments. See Town of Deerfield, New York, 992 F.2d 420, 428-29 (2nd Cir. 1993).

^{5/} Administrative efficiency also dictates that the Commission stay this proceeding while it considers the Petition to Dismiss Application of Shurberg Broadcasting of Hartford filed on August 14, 1997 by the Trustee Two If By Sea Broadcasting Corp. See, e.g., James A. Kay, Jr., 12 FCC Rcd 2898 (1997) (stating the Commission's disfavor of bifurcated hearings).

proceeding, the Commission commenced this proceeding questioning Ramirez's participation in ACCLP.^{6/} This proceeding is substantially harming a person whom the minority ownership policy was designed to help, and that is fundamentally unfair! Thus, the Commission has a duty to reexamine its hasty decision to designate which failed to take account of the civil litigation.

5. The Commission should delete the designated issue because the very matters at issue here were fully litigated by experienced counsel before impartial tribunals. It is the Commission's practice to delete an issue where there is a "compelling showing of unusual circumstances, such as where the Commission overlooked, misconstrued, or failed to consider pertinent information relative to its determination to specify the issue for hearing." See, e.g., WOIC, Inc., 40 F.C.C. 2d 770 (Rev. Bd. 1973). It is difficult to imagine a more compelling set of circumstances than where the issues designated for hearing have already been fully addressed by the civil courts and the Commission overlooked this judicial resolution in designating the already-resolved matter for hearing. Furthermore, while the HDO commences a broad inquiry into whether ACCLP misrepresented facts to the Commission, the only issue that has concerned the Mass Media Bureau and Judge are ACCLP's income tax filings. Neither the Bureau nor the Judge has set forth any rationale for the full-scale inquiry set forth in the HDO.^{7/}

^{6/} The Mass Media Bureau has admitted that it is not "conversant with the bankruptcy trial record." See Mass Media Bureau's August 14, 1997 Comments on Petition for Modification of Procedural Dates at 2.

^{7/} As Ramirez has previous demonstrated, this matter was explicitly covered in the Bankruptcy Court proceeding. Testimony on this issue was heard from Ramirez, limited partners of ACCLP and accountants for ACCLP. For example, the Trustee's Proposed Findings of Fact and Conclusions of Law specifically addressed the issue of Ramirez's ownership. See Attachment F. It is ludicrous to suggest that if the Bankruptcy Court had found that Ramirez's ownership had dropped below 21%, the Court would not have mentioned that issue -- particularly since the Court specifically found that Ramirez held 21% of ACCLP.

6. Finally, the MO&O's dismissive treatment of the Commission's recent MobileMedia decision also requires review. The Commission will waive its rules if presented with a "strong showing that the ALJ completely ignored, or did not even attempt to conscientiously apply the Commission's recent precedent." See Elinor Lewis Stephens, 9 FCC Rcd 5259, 5259 (Rev. Bd. 1994). Here, the MO&O never attempted to apply the recent Second Thursday precedent set forth in MobileMedia. Instead, the MO&O stated that "the facts and circumstances for granting the relief [in MobileMedia] differ significantly from those considered in the instant proceeding." MO&O at 4. However, a comparison of the facts in this case to those in MobileMedia illustrate that the application of the Second Thursday doctrine is far more compelling in this case since the *admitted* wrongdoings in MobileMedia were far worse than the mere *allegations* that led to the HDO in this case. Thus, the MO&O's failure to apply MobileMedia to the facts of this case, coupled with the absence of any mention of MobileMedia in the ALJ's Order denying Ramirez's petition to appeal the MO&O, demands Commission review.

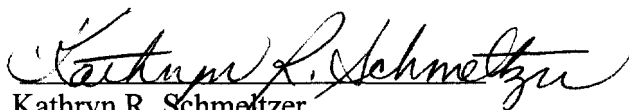
For the foregoing reasons, Ramirez urges the Commission to reverse the MO&O and grant the relief requested in Ramirez's Petition for Emergency Relief and Stay of Proceeding.

Respectfully submitted,

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Dated: September 25, 1997

CERTIFICATE OF SERVICE

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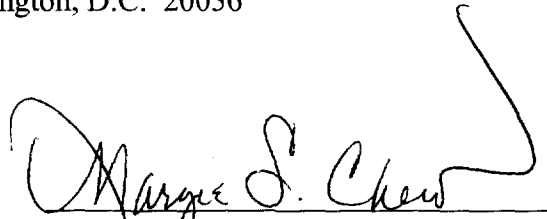
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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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JUL 25 1997

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Station WHCT-TV, Hartford, Connecticut)	
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and)	
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Shurberg Broadcasting of Hartford)	
)	
For Construction Permit for a New)	File No. BPCT-831202KF
Television Station to Operate on)	
Channel 18, Hartford, Connecticut)	
)	
 To: The Honorable John M. Frysiak Administrative Law Judge		

PETITION FOR EMERGENCY RELIEF AND STAY PROCEEDINGS

Respectfully submitted,

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SUMMARY

Richard P. Ramirez ("Ramirez" or the "Petitioner") is filing this Petition for Emergency Relief and Stay of Proceedings because there is an urgent need for the Commission to reconsider its decision to designate a misrepresentation issue in this proceeding. When the Commission released its Hearing Designation Order (the "HDO") adding the misrepresentation issue against the Trustee's license renewal application, it did so on the basis of a 3½ year old pleading filed by Shurberg Broadcasting of Hartford ("Shurberg") which presented allegations from one party in pleadings filed in a Connecticut bankruptcy case involving Astroline Communications Company Limited Partnership ("ACCLP"). Because Shurberg's allegations were in turn based on "allegations" by one party to the bankruptcy proceeding, and Shurberg never alerted the Commission to the decisions that were reached, the Commission did not review the arguments of the other party to the bankruptcy proceeding or consider the decision reached by the U.S. Bankruptcy Court, District of Connecticut. That decision was affirmed by the United States District Court, District of Connecticut and ultimately by the U.S. Court of Appeals for the Second Circuit. The bankruptcy litigation conclusively dealt with and rejected the "allegations" that resulted in the HDO. The proceeding before the U.S. Bankruptcy Court lasted for nine trial days and included many witnesses and over 300 exhibits. Significantly, the Bankruptcy Court Judge concluded as follows:

The court concludes that Astroline Company's [the limited partner's] activities in connection with the Debtor [ACCLP] do not meet the standard of substantially the same as the exercise of powers of a general partner. Despite the intense level of investigation undertaken by the Trustee of the Debtor's prepetition history, the Court would have to engage in conjecture and surmise to find any control of the Debtor's day-to-day operation of the Channel 18 television station. The court credits the testimony of Ramirez, supported by that of Planell and Rozanski, that he, as the managing general partner, exercised fully his powers as such, and that Astroline Company had no equal control in his decisions.

(Attach. A at 14-15) (Emphasis added).

The instant proceeding would involve re-litigating the same matters that the U.S. Bankruptcy Court has already addressed, at great expense to the Commission and the parties. It is evident from the document requests that have been filed that the FCC is seeking the same information that was already produced in the Bankruptcy Court proceeding. Re-litigating these matters violates principles of full faith and credit, is unfair to the Petitioner, is a colossal waste of time and is completely unnecessary. Indeed, the FCC hearing proceeding is particularly unfair to Ramirez, who testified at length in the bankruptcy proceeding and had no notice that the FCC intended to re-litigate the same matters. Ironically, the Commission's proceeding is substantially harming the very minority participant its policies were designed to assist.

Accordingly, the Presiding Judge must stay this proceeding and delete the misrepresentation issue. Such relief is fully supported by the Commission's recent decision to stay the MobileMedia case pending consideration of relief under the Second Thursday policy. See MobileMedia Corporation, et al., FCC 97-197 (released June 6, 1997).

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For Construction Permit for a New)	File No. BPCT-831202KF
Television Station to Operate on)	
Channel 18, Hartford, Connecticut)	
)	
To: The Honorable John M. Frysiak		
Administrative Law Judge		

PETITION FOR EMERGENCY RELIEF AND STAY OF PROCEEDINGS

Richard P. Ramirez ("Ramirez" or the "Petitioner"), by his attorneys, hereby requests the Presiding Judge to stay this proceeding and delete the misrepresentation issue designated against Astroline Communications Company Limited Partnership ("ACCLP") in the Memorandum Opinion and Order & Hearing Designation Order in this proceeding, See In re Applications of Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership For Renewal of License of Station WHCT-TV, Hartford, Connecticut, Memorandum Opinion and Order & Hearing Designation Order, FCC 97-146 (released April 28, 1997) (the

"HDO").¹ The relief requested is justified by (a) the favorable outcome of a Connecticut bankruptcy proceeding involving the very facts that led to the designation for hearing and (b) the Commission's arbitrary and capricious failure to grant relief to Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership ("Trustee") under the Commission's Second Thursday doctrine in light of the Commission's willingness to entertain such relief in the recently released case of MobileMedia Corporation, FCC 97-197 (released June 6, 1997) ("MobileMedia").²

1. This petition is premised on the principle that it is fundamentally unfair, inefficient, counterproductive and contrary to the public interest to re-litigate matters that have already been thoroughly adjudicated in a civil proceeding. The Trustee's application for renewal of license was erroneously designated for hearing based on two significant mistakes. First, the Commission's reliance on 3½ year old allegations advanced by Shurberg Broadcasting of Hartford ("Shurberg") was misplaced. Shurberg failed to apprise the Commission of the court cases disposing of the very allegations it had advanced in support of an issue. In fact, the allegations that led to the designation of the misrepresentation issue concerning ACCLP were only allegations advanced by one party in a bankruptcy proceeding. Those same allegations have

¹ The Presiding Judge has the authority to act on motions to delete hearing issues. See Section 1.243(k) of the Commission's rules. See also Practice and Procedure, 36 R.R.2d 1203 (1976).

² This is the first opportunity that the Petitioner has had to raise these matters. Shurberg never served Ramirez or the other principals of ACCLP with the Commission and court pleadings that led to the HDO, and Ramirez had no opportunity to respond to the allegations or to present his information and position before designation. Ramirez recently retained FCC counsel who has only just had the opportunity to review the transcripts and exhibits in the Connecticut court proceedings. Ramirez was not a party to this proceeding until June 20, 1997 at which time he was granted leave to intervene (See FCC 97M-109, granting Ramirez leave to intervene).

been thoroughly adjudicated and rejected in the civil court system. The U.S. Bankruptcy Court, District of Connecticut, conducted a nine day vigorously-litigated hearing on the operation and conduct of ACCLP which extensively covered the very matters addressed in the HDO. Hoffman v. WHCT Management, Inc. (In re Astroline Communications Co. Ltd. Partnership), 188 B.R. 98 (Bankr. D. Conn. 1995) (Attach. A hereto). The United States District Court, District of Connecticut (Nevas, J.), affirmed the judgment of the Bankruptcy Court (Attach. B), and the United States Court of Appeals for the Second Circuit affirmed the Bankruptcy Court's decision in favor of ACCLP by Summary Order on appeal (Attach. C).

2. During the Bankruptcy Court hearing, the court heard testimony from Ramirez, limited partners of Astroline Company, management-level personnel at the station and partners of the accounting firm of Arthur Andersen, LLP concerning the ownership and control of ACCLP. The court concluded that Ramirez had control of the day-to-day operation of the station and that the limited partners had not acted as general partners of ACCLP. (See Attachs. A-C).

3. Second, the Commission's failure to follow its longstanding Second Thursday doctrine in this case is arbitrary and capricious as stunningly demonstrated by the recent Commission action in MobileMedia, supra. Thus, as further discussed below, this proceeding should be stayed, the designated issue should be deleted, and the case should then be certified to the Commission for reconsideration of the applicability of the Second Thursday doctrine.

I. BACKGROUND

4. In December 1984, the Commission approved ACCLP's application to acquire Station WHCT-TV, Channel 18, Hartford, Connecticut, pursuant to its minority distress sale

policy.³ See Faith Center, Inc., 99 FCC 2d 1164 (1984). At the same time, the Commission also granted the station's license renewal application, which had been deferred pending the resolution of a hearing to determine the qualifications of the station's prior licensee, Faith Center, Inc. ("Faith Center").⁴

5. As noted in the HDO, in approving the assignment to ACCLP in Faith Center, Inc., the Commission found that ACCLP was a limited partnership comprised of two general partners and one limited partner. (HDO, para. 3). The two general partners were Ramirez, an Hispanic American, and WHCT Management, Inc. As disclosed in the assignment application, Fred J. Boling, Jr. ("Boling") was President of WHCT Management, Inc. As the Commission was aware, the limited partner was Astroline Company. Ramirez held a 21% ownership interest and a 70% voting interest in ACCLP; WHCT Management, Inc. held a 9% ownership interest and a 30% voting interest in ACCLP; and Astroline Company, the sole limited partner of

The Commission's distress sale policy has provided an exception to the Commission's general rule against authorizing the assignment or transfer of control of a broadcast license during the pendency of a hearing to resolve the qualifications of a licensee. The policy has allowed broadcasters whose renewal applications have been designated for hearing to assign the station's license to FCC-approved minority enterprises. It was adopted by the Commission as part of its efforts to increase minority opportunities by enabling minority entrepreneurs to capitalize their broadcasting ventures by attracting and utilizing the investments of others to a greater extent. See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C. 2d 849, 855 (1982). In 1982, the FCC determined that a limited partnership could qualify as a minority enterprise under the Commission's distress sale policy if the general partner is a member of a minority group who holds at least 20 percent ownership and who will exercise complete control over a station's affairs. Id.

The renewal application had been the subject of one of several unremitting attacks by Shurberg against the station's past, current and proposed licensees. One of Shurberg's earliest assaults came in December 1983 in the form of a failed attempt to file with the Commission a competing application against Faith Center's deferred renewal application (See FCC File No. BPCT-831203KF). The Commission refused to accept Shurberg's application because the station's renewal application was in hearing status at the time.

ACCLP, held a 70% ownership interest in ACCLP. The assignment application further reflected that, in addition to its limited partnership interest in the assignee, Astroline Company was also the owner of all of the outstanding common stock of WHCT Management, Inc. (See Attach. D, Ex. 3). During the period in issue, Mr. Ramirez's 21% ownership interest in ACCLP did not change, as reflected in an exhibit introduced in the bankruptcy hearing (See Attach. E which was Exhibit 157 in the Bankruptcy Court proceeding).⁵

6. ACCLP consummated its acquisition of WHCT-TV in January 1985, made substantial improvements to the station's physical plant and operated the station on the air between 1985 and 1991. During this entire period of time, Shurberg pursued litigation in the courts contesting ACCLP's right to acquire the station which resulted in substantial expenses for ACCLP as well as legal uncertainty as to the status of its license. Shurberg's attack was founded on the constitutionality of the Commission's distress sale policy; and because the FCC wavered in its defense of the policy during the course of the litigation, ACCLP faced the task of defending the policy. The legal uncertainty created by Shurberg prevented ACCLP from obtaining the bank financing that it had originally anticipated and contributed materially to the financial plight of the station.

7. On October 31, 1988, certain creditors of ACCLP (namely, program suppliers) filed an involuntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. At ACCLP's request, the Bankruptcy Court converted the case to one under Chapter 11. However,

⁵ Ownership information filed with the FCC (see, e.g., Attach. F) also reflected that Mr. Boling was an officer and director of general partner WHCT Management, Inc.; Herbert A. Sostek ("Sostek") was Chairman of the Board and a director of general partner WHCT Management, Inc.; and Richard H. Gibbs was a Vice President and Director. Boling, Sostek and Richard H. Gibbs, along with Randall L. Gibbs, were also both general and limited partners of Astroline Company. (Attachs. D and F).

upon motion by the Official Committee of Unsecured Creditors, the Debtor's case was reconverted to a case under Chapter 7 on April 9, 1991.⁶ During this period, ACCLP filed a short form assignment application to ACCLP, Debtor in Possession, and subsequently filed a short form application to assign WHCT-TV to the Trustee (See FCC File No. BALCT-910506KH). The Commission granted this assignment on May 24, 1991, and the grant became final on July 7, 1991. In September 1993, the Trustee filed with the Commission an application on FCC Form 314 to assign WHCT-TV to Two If By Sea Broadcasting Corporation ("TIBS") in order to satisfy the claims of ACCLP's creditors.

8. In the meantime, ACCLP had filed an application for renewal of license for WHCT-TV in December 1988. In February 1991, the Commission reinstated the competing application that Shurberg had attempted to file against the station's previous license renewal application eight years earlier. See Public Notice, Report No. 14926 (released February 8, 1991). On November 3, 1993, Shurberg petitioned the Commission to dismiss or deny both the assignment application and the pending license renewal application and to immediately grant its competing application for the station. Shurberg called into question, among other things, the truth of representations made by ACCLP regarding its status as a minority-controlled entity pursuant to the Commission's distress sale policy. Shurberg's petition alleged that the Trustee held the licenses for WHCT-TV only because ACCLP successfully acquired the station based on supposed "blatant and repeated misrepresentations to the Commission and the courts."⁷ (Pet. to

⁶ The conversion to Chapter 7 occurred after ACCLP had achieved a positive cash flow and after numerous attempts to settle the case with the creditors. As ACCLP's General Partner, Mr. Ramirez vigorously contested the conversion.

⁷ Shurberg's petition concerned ACCLP's representations that it was a minority-controlled limited partnership in pleadings filed with the FCC, the U.S. Court of Appeals for the
(continued...)

Dismiss or Deny, p. 10).

9. What Shurberg's petition and related filings all conveniently failed to disclose to the Commission, however, is that the pleadings upon which Shurberg relied to support its allegations and the facts presented therein were fully litigated in, and disposed of by, the civil courts to which they were proffered in the first instance. Those courts, beginning with the United States Bankruptcy Court for the District of Connecticut and continuing all the way through the United States Court of Appeals for the Second Circuit have consistently determined that Ramirez was in control of ACCLP and that ACCLP's limited partners did not act as general partners. Thus, it was Shurberg, not Astroline or its successors, who was misleading the Commission and the courts by never disclosing the 1995 Bankruptcy Court decision, the 1996 District Court decision or the 1997 Second Circuit decision.

10. Both the general and limited partners of ACCLP were sued in the bankruptcy proceeding. Richard Ramirez spent considerable sums to defend his reputation and voluntarily testified in a lengthy deposition and for several days during the trial. The last thing that Mr.

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(...continued)

D.C. Circuit, and the Supreme Court. These proceedings culminated in the Supreme Court's decision in Metro Broadcasting, which was decided together with Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc., et al. ("Astroline"). See Metro Broadcasting, Inc. v. Federal Communications Commission et al., 110 S. Ct. 2997 (1990). The Astroline line of cases addressed and upheld the constitutionality of the Commission's distress sale policy. In pleadings filed with the Commission and the U.S. Court of Appeals for the D.C. Circuit between 1993 and mid-February 1997, Shurberg continued to accuse ACCLP of fraudulent conduct. See, e.g., Shurberg's "Formal Opposition to, and Motion to Strike, Letter Request Seeking Emergency Relief," filed December 27, 1996, and Shuberg's "Supplement to Emergency Petition to Recall Mandate" filed with the U.S. Court of Appeals for the D.C. Circuit filed February 10, 1997. However, as demonstrated herein, the Second Circuit as well as the Bankruptcy and District Courts before it, have already thoroughly examined the allegations advanced by Shurberg, a fact Shurberg never mentioned in its pleadings.

Ramirez, or anyone else, envisioned was the possibility that the allegations resolved in the bankruptcy would be revisited in their entirety by the FCC.

11. As a result of Shurberg's allegations and without any recognition of the court decisions resolving the allegations in ACCLP's favor, on April 28, 1997, the Commission designated for hearing the issue of whether ACCLP misrepresented facts to the Commission and the Federal Courts in connection with statements it made concerning its status as a minority-controlled entity and whether the public interest would be served by a grant of the renewal application filed by the Trustee. The Commission's action came without any warning to the Petitioner and provided no opportunity for him to set the record straight. See n.2, supra.

12. Ramirez has already litigated this case once. It is unconscionable that he must re-litigate the same facts to counter the harmful allegations in the HDO and injury to his reputation they may have generated. Indeed, the Commission appears to be punishing minorities, not assisting them, as originally contemplated by the distress sale policy. As demonstrated herein, because the civil proceeding was so extensive in its inquiry into the operation of ACCLP, there is no need to revisit the Court's findings and conclusions.

13. In designating this case for hearing, the Commission also refused to apply its Second Thursday doctrine⁸ pursuant to which the Commission, in bankruptcy cases, has a policy of accommodating the concerns underlying bankruptcy laws, such as the protection of innocent creditors. The Commission's refusal to apply its Second Thursday doctrine was based on an erroneous depiction of the facts and cannot be reconciled with Commission action in similar cases and is therefore arbitrary and capricious.

⁸ Second Thursday Corp., 22 F.C.C. 2d 515, recon. granted, 25 F.C.C.2d 112 (1970).

II. THE INSTANT PROCEEDING SHOULD NOT HAVE BEEN DESIGNATED FOR HEARING

14. As detailed below, the Commission's decision to designate this proceeding for hearing cannot be justified. First, the Commission must accord full faith and credit to the determinations of the civil courts. The line of inquiry that the Commission intends to follow in the hearing has already been fully and completely explored; ACCLP, and its general partners, Ramirez, and WHCT Management, Inc., as well as limited partner Astroline Company and the partners thereof, have been subjected to a full hearing in the U.S. Bankruptcy Court for the District of Connecticut, as well as subsequent appeals. Designating this proceeding for hearing upsets judicial and administrative efficiency. Second, the Commission's decision to designate this proceeding cannot be reconciled with its recent MobileMedia decision. The Commission erred in refusing to apply its Second Thursday doctrine to the facts of this proceeding, ignoring over twenty years of policy and precedent. In MobileMedia, the Commission issued a stay and commenced a Second Thursday inquiry based on facts far less compelling than those in this proceeding.

A. The Allegations At Issue Have Already Been Addressed and Rejected in the Civil Court Proceedings

15. The Connecticut Bankruptcy Court case was initiated by the Trustee for the benefit of ACCLP's creditors and sought to recover over \$30 million. The lawsuit was vigorously fought by prominent law firms who conducted extensive depositions, litigated a nine day trial with numerous witnesses before the Bankruptcy Judge and introduced over 300 trial exhibits.

16. To the Petitioner's knowledge, no prior hearing designation order has been premised on allegations made by one party to a civil court case without any recognition of the

position of the other parties and without any consideration of the outcome of the case. Those facts alone mandate reconsideration here in the name of fairness to the Petitioner.

17. Had the Commission examined the bankruptcy proceeding, it would have realized that Shurberg's allegations had been fully addressed by the Bankruptcy Court. The Memorandum of Decision of the Chief Bankruptcy Judge dated October 24, 1995, is attached as Attachment A. The Ruling on Appeal from Bankruptcy Order issued by a United States District Judge of the United States District Court, District of Connecticut, dated August 12, 1996, is attached as Attachment B. The Summary Order of a three judge panel of the U.S. Court of Appeals for the Second Circuit, composed of the Chief Judge, a Circuit Judge and a District Judge, dated April 17, 1997, is attached as Attachment C.

18. Shurberg's allegations at the FCC were entirely based on allegations taken from a pleading filed by the Trustee in the Bankruptcy Court proceeding which claimed that "[ACCLP's non-minority limited partners] were involved in the daily operations and acted as general partners of [ACCLP] in various ways . . ." (Pet. to Dismiss or Deny, p. 9). At the time the Trustee advanced the allegation, he was seeking to obtain over \$30 million for the creditors and hoped to accomplish this by reaching the pockets of the limited partners. However, the Bankruptcy Court decision, which Shurberg never brought to the Commission's attention, rejected the Trustee's allegation stating:

Ramirez developed a business and operating plan for Channel 18, hired Terry Planell ("Planell"), a native of Cuba and a person experienced in television programming, to be station manager, and Alfred Rozanski ("Rozanski") to be the Debtor's business manager. While Ramirez and Rozanski met with Boling on occasion to explain the Debtor's annual budget, throughout the 1985-1988 time period when Channel 18 was operating, Ramirez and Planell, together or separately, handled the matters of hiring and firing of station personnel, station

programming, equipment purchases, and dealing with the Debtor's vendors.

(Attach. C, page 5).

The court concludes that Astroline Company's activities in connection with the Debtor do not meet the standard of substantially the same as the exercise of the powers of a general partner. Despite the intense level of investigation undertaken by the Trustee of the Debtor's prepetition history, the court would have to engage in conjecture and surmise to find any control of the Debtor's day-to-day operation of the Channel 18 television station. The court credits the testimony of Ramirez, supported by that of Planell and Rozanski, that he, as the managing general partner, exercised fully his powers as such, and that Astroline Company had no equal voice in his decisions.

(Attach. C, page 18-19).

The Cash Management System, with Astroline Company in control of the Debtor's checkbook and the sweeping of all of the Debtor's income to the out-of-state bank, certainly justifies the Trustee's questioning of the status of Astroline Company as simply a limited partner of the Debtor. The court, however, cannot find as a fact that Astroline Company ever did anything more than prepare the checks as directed by Ramirez or Rozanski and add to the Debtor's bank account those funds necessary to make good the issued checks. Funding in this manner reduced the borrowing costs of Astroline Company. While Astroline Company had the power to empty the Debtor's bank account, it never did so; neither did it refuse to prepare checks in order to override any decision of Ramirez. Ramirez testified that until the funding by Astroline Company ceased, every invoice was paid that he wanted paid. All of the relatively few checks which were signed by the Astroline Company partners, except for two, were adequately explained as due to Ramirez's absence, or for other reasonable considerations.

(Attach. C, page 19).

The Chief Judge of the Bankruptcy Court concluded that "the actions of Astroline Company, proven at trial, do not constitute participation in control of the business substantially the same as the exercise of the powers of a general partner." (Attach. A, p. 20).

19. The Bankruptcy Court also extensively considered the issue of whether Ramirez retained his 21% ownership interest in ACCLP. Ramirez and two partners of the well known accounting firm of Arthur Andersen, LLP ("Arthur Andersen") testified concerning this matter. Kent Davenport, a partner at Arthur Andersen and a tax attorney, testified that special allocations were permitted under the Internal Revenue Code which allowed profit and loss allocations to differ from ownership percentages. Because of the substantial losses that were incurred by Astroline Company's limited partners (in part due to Shurberg's continued attacks on the license), Arthur Andersen recommended that ACCLP's losses be allocated to the limited partners until ACCLP began generating profits, at which time income would be allocated to the limited partners until their losses had been offset, bringing their capital accounts back to zero. (Kent Davenport testimony, Tr. 6-85 - 6-87, attached hereto as Attach. G). Documents prepared by Arthur Anderson memorializing this advice are attached as Attachs. H and I. Attach. H, a May 1985 memorandum, recommended such an allocation. This attachment was Exhibit 41 in the Bankruptcy case which Mr. Davenport referred to in his testimony. Exhibit 118 in the Bankruptcy Court proceeding, attached hereto as Attach. I, consists of ACCLP's Financial Statements for the year ended December 31, 1986. The Notes to the Financial Statements reflect the following:

Profits, losses and cash flow are allocated 99% to the limited partners as a class and 1% to the general partners as a class until the limited partners are repaid their capital contributions, plus a return (based on the prime interest rate) on any contributions funded by the limited partners. The total amount contributed to the

Partnership by the limited partners was \$18,310,999.

Subsequent to these distributions, the two individual general partners will receive a priority distribution of \$1,000,000 after which all further profits, losses and cash flow will be allocated in accordance with the ownership percentages in the Partnership agreement.

The limited partners have a 72% ownership interest in the Partnership with the remaining 28% ownership allocated to the general partners.

(Attach. I, pp. 8-9).

Thus, the IRS returns submitted by Mr. Ramirez and the limited partners of Astroline Company simply reflected the tax allocation that Arthur Andersen had recommended. That allocation, which was considered in the Bankruptcy Court case, did not change Mr. Ramirez's 21% ownership interest at all. (See Attach. F). Mr. Ramirez also testified during the Bankruptcy case that he had a 21% interest in ACCLP and control of its operations as well.

20. The Commission has stated that it has generally found "control" to be in those who have authority to determine the basic policies of a station's operations, including programming, personnel and financial matters. See Southwest Texas Broadcasting Council, 85 F.C.C. 2d 713, 715 (1981). The Bankruptcy Court trial and decision fully addressed all of these aspects and found in favor of ACCLP, and both the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit affirmed the decision of the Bankruptcy Court.^{2/} It would not serve the public interest to re-litigate all of these matters.

^{2/} The District Court affirmed the judgment on the ground that the Trustee lacked standing to assert his claim against the limited partners. The Second Circuit held that even if the Trustee might have lacked standing, the Limited Partners would not be held liable under Massachusetts law. The Second Circuit specifically reviewed and affirmed the Bankruptcy Court's factual findings.

21. As determined by the civil courts and in accordance with the Commission's general policy, Ramirez retained authority to determine the basic policies of the station's operations, including programming, personnel and financial matters. These holdings are consistent with ACCLP's candid representations to the Commission and the courts regarding its status as a minority-controlled entity.

22. On March 29, 1984, the Commission adopted a Report and Order in Attribution of Ownership Interests, 97 F.C.C.2d 997, (released April 30, 1984), setting forth standards for attributing interests in broadcast properties. The Commission's Report and Order stated that limited partners would be exempt from attribution where the limited partnership conforms in all significant respects to the provisions of the RULPA. 97 F.C.C.2d at 1022-23. ACCLP's application to acquire WHCT-TV was filed in May 1984 and granted in December 1984. During this period, the Commission standard for evaluating attribution of limited partners was compliance with the RULPA.¹⁰

23. Significantly, the Bankruptcy Court examined the conduct of ACCLP's limited partners and the operation of ACCLP under the provisions of the Massachusetts Limited Partnership Act (the "MLPA") Mass. Gen. L. ch. 109, as revised in 1982, pursuant to which ACCLP was organized. (See Attach. A). The MLPA, as revised in 1982 is based upon the Revised Uniform Limited Partnership Act of 1976 (the "RULPA"). Compliance with the MLPA

¹⁰ Subsequent to the grant of ACCLP's assignment application and well after the assignment had been consummated, the Commission adopted insulation guidelines for limited partnerships which identified various criteria which the Commission stated that it would use to determine whether limited partners were complying with the Commission's policies. See Multiple and Cross-Ownership of AM, FM, TV and CATV Systems, 55 R.R.2d 604 (released June 24, 1985). These guidelines did not become effective until July 31, 1985, and the Commission's Memorandum Opinion and Order does not reflect any intention by the Commission to apply these guidelines retroactively.